



February 27, 1992

MEMORANDUM

To: Director  
Division of Legislation & Regulations

From: Attorney Advisor  
Public Health Division

Subject: RFO 91-120: Self-Governance Authority

You initially asked for our opinion whether recent amendments to Title III of the Indian Self-Determination Act (25 U.S.C. 450f note), in Pub. L. 102-185, 105 Stat. 1278, authorize the Indian Health Service (IHS) to spend funds referred to in the Conference Report to the Fiscal Year 1992 appropriation to conduct the feasibility study required by the recent amendments or to reimburse tribes for planning activities under Title III. The initial request was modified by memorandum dated February 19, 1992, in which the IHS indicated that it plans to obtain the data [for the study] and to meet the statutory requirement for consultation with the Self-Governance Tribes (SGT) through one or more grants. The SGT have established a planning group which is expected to recommend to the SGT that a grant go to a single tribe which, in turn, will organize the consultation. Though the main purpose will be to provide data and input for the IHS study and recommendations, it is possible that each of the SGT will also end up with a plan on how it would proceed to implement any future self-governance statute.

Under the IHS' proposed plan, the primary legal issues are: (1) whether the IHS has authority to make a grant to a tribe to organize the tribal consultation and provide the IHS with data for the IHS study, and (2) what the appropriate legal instrument would be to formalize the relationship between the IHS and the tribe. As set forth below, it is our view that Title III, as amended, does not authorize an assistance relationship and, therefore, the appropriate legal instrument for the proposed arrangement would be a procurement contract rather than a grant.

BACKGROUND

Title III of the Indian Self-Determination Act, 25 U.S.C. 450f note, authorizes the Secretary of the Interior to conduct a research and demonstration project known as the Tribal Self-

Governance Project. Recent amendments to Title III add a new section 308 which requires the Secretary of Health and Human Services to conduct a study to determine the feasibility of extending the demonstration project under Title III to IHS activities. Section 308 provides as follows:

Sec. 308 (a) The Secretary of Health and Human Services, in consultation with the Secretary of the Interior and Indian tribal governments participating in the demonstration project under this title, shall conduct a study for the purpose of determining the feasibility of extending the demonstration project under this title to the activities, programs, functions, and services of the Indian Health Service. The Secretary shall report the results of such study, together with his recommendations, to the Congress within the 12-month period following the date of the enactment of the Tribal Self-Governance Demonstration Project Act.

(b) The Secretary of Health and Human Services may establish within the Indian Health Service an office of self-governance to be responsible for coordinating the activities necessary to carry out the study required under subsection (a).

The Conference Report to the Fiscal Year 1992 Department of the Interior and Related Agencies Appropriation, which includes appropriations for the IHS, provides in relevant part as follows:

14. The IHS should initiate planning activities with tribal governments with approved self-governance compacts for development of a Self-Governance Demonstration Project as authorized by Public Law 100-472;

15. Within the funds available to the IHS, \$500,000 should be set aside to reimburse participating self-governance tribal governments for planning expenses; and

16. The IHS, in close coordination with participating self-governance tribes, should report to the Committees, no later than two weeks before its first fiscal year 1993 budget hearing, on the status of self-governance planning including budget requirements, the development of transfer models including experimental operations, and

proposed monitoring and evaluation methodologies.

H.R. Rep. No. 256, 102nd Cong., 1st Sess. 86-87 (1991).

In summary, the IHS is required by section 308 to conduct a study to determine the feasibility of extending the self-governance demonstration project authorized by Title III to IHS activities and to report the results of the study to Congress. No separate funds were appropriated for this study but funds from the IHS' lump sum appropriation were earmarked in the conference report to reimburse participating self-governance tribes for planning expenses. 1/

#### ANALYSIS

At the outset, it is clear that the IHS is required by section 308 to conduct a feasibility study and that the IHS may use funds from its general lump sum appropriation to conduct the study. The IHS has indicated that it plans to make a grant to a tribe to organize the consultation required by section 308 and to provide the IHS with data and input for the study.

The Federal Grant and Cooperative Agreement Act of 1977 (FGCAA), Pub. L. 95-224, 31 U.S.C. 6301 et seq., provides the criteria for determining whether an arrangement should be a grant, cooperative agreement or contract. Generally, a contract is the proper funding vehicle when the services being acquired are for "the direct use and benefit of the Government." See 31 U.S.C. 6303. Grants and cooperative agreements are to be used when the principal purpose of the relationship or transaction is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by Federal statute. See 31 U.S.C. 6304-6305. The principal difference between grants and cooperative agreements is that a grant does not usually involve substantial participation by the agency; a cooperative agreement will usually involve substantial participation by the agency. Id.

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1/ This earmark was not carried over into the appropriations statute itself and, therefore, is not binding on the IHS as a matter of law. See United States General Accounting Office, Principles of Federal Appropriation Law at 5-95; In the Matter of LTV Aerospace Corporation, B-183851, 55 Comp. Gen. 307, 319 (1975); Int'l Union, United Auto, Aerospace v. Donovan, 746 F.2d 855, 860-861 (D.C.Cir. 1984). Nor does the Conference Report language provide authority for the IHS to reimburse tribes for planning expenses as Title III was not amended to give the IHS the same authority as the Department of the Interior to enter into planning agreements with the participating tribes. See generally 25 U.S.C. 450f note.

However, before determining the appropriate legal instrument for a given transaction, an agency's authority to enter into a grant, contract or cooperative agreement must first be found in the agency's authorizing legislation itself. See Interpretation of Federal Grant and Cooperative Agreement Act of 1977, B-196872, March 12, 1980. In general, every agency has inherent power to enter into contracts for the performance of activities it is authorized to carry out. However, agencies do not have the authority to donate Government funds to assist non-Government entities to accomplish their own purposes without clear evidence that Congress intended to authorize an assistance relationship. See In the Matter of Council on Environmental Quality, B-218816, 65 Comp. Gen. 605, 607 (1986) citing B-210655, April 14, 1983. In order to provide assistance through a grant or cooperative agreement, there must be affirmative legislative authority. Id.

Where the specific words "grant" or "cooperative agreement" have not been used, it must be determined what kind of relationships the agency's statute was intended to authorize. See supra. B-196872. Essentially, the "principal purpose" of the agency's statute governs interpretation of the agency's authority. Id. Here, section 308(a) requires that the IHS, in consultation with the Secretary of the Interior and the Self-Governance Tribes, conduct a study for the purpose of determining the feasibility of extending the self-governance demonstration project to the activities of the Indian Health Service. The IHS is to report the results of this study to the Congress. Thus, the principal purpose of section 308 is to have the IHS conduct a feasibility study and report the results of the study to the Congress. In our view, there is no indication in the language of section 308 that it is intended to authorize an assistance relationship. However, as stated above, every agency has inherent authority to contract for the performance of activities which the agency has the authority to carry out. Thus, the IHS may contract with a tribe to conduct the study required by section 308.


Having found that section 308 does not authorize an assistance relationship, under the criteria in the FGCAA, the appropriate legal instrument to carry out the IHS' proposed arrangement has to be a contract. In discussing situations where an organization is used to carry out an agency's functions, Comptroller General decision B-196872 provides as follows:

Assisting the Government to carry out its own functions is not grant "assistance" as contemplated by the FGCA, it is a procurement relationship. Accordingly, the rule may be stated that where the recipient of an award is not an organization that the Federal grantor is authorized to assist, but is

merely being used to provide a service to another entity which is eligible for assistance, the proper instrument is a contract.

Similarly, in another Comptroller General decision, at 65 Comp. Gen. 605, the Comptroller General addressed whether the Council on Environmental Quality (CEQ) had authority to enter into a cooperative agreement (assistance relationship) with the National Academy of Sciences (NAS) under which the NAS would conduct a study regarding pesticide use. The Comptroller General found that the CEQ had authority to sponsor the study but found no specific authority for it to enter into an assistance relationship with NAS. The results of the proposed study were found to be clearly intended to benefit the Environmental Protection Agency as well as other regulatory agencies, and therefore, the proper funding vehicle was found to be a contract rather than a cooperative agreement. 65 Comp. Gen at 605-607.

Similarly, in the present situation, while the IHS clearly has authority to conduct the study, section 308 does not authorize an assistance relationship. The expressed purpose of the IHS' proposed arrangement is "to provide data and input for the IHS study and recommendations." The results of the proposed arrangement are clearly intended for the direct benefit and use of the IHS in meeting the requirements of section 308. Thus, as in the Comptroller General opinions cited above, the appropriate legal instrument for the IHS' proposed arrangement is a procurement contract rather than a grant.

  
Lindsay Naas  
Attorney Advisor  
Public Health Division



DEPARTMENT OF HEALTH & HUMAN SERVICES

Public Health Service

Indian Health Service  
Rockville MD 20857

FEB 19 1992

TO: Senior Attorney  
Public Health Division

FROM: Director

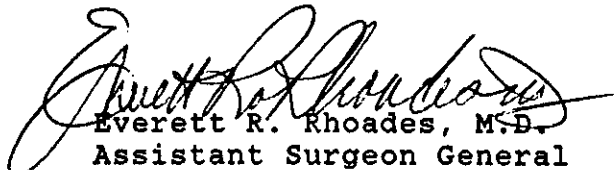
SUBJECT: RFO: 91-120: Self-Governance Authority

The purpose of this memorandum is to provide you with additional information which may be helpful in responding to requests for opinions previously submitted on self-governance.

It is the Indian Health Service (IHS) intention to prepare the report to Congress called for by the recently enacted section 308 of Public Law (P.L.) 93-638. The section 308 study is to "determine the feasibility of extending the demonstration project under this title to . . . the Indian Health Service . . . with [the Secretary's] recommendations. . ." It is proposed to use the \$500,000 earmarked for self-governance in the Conference Report 102-256 at 86-7, items 15 and 16.

The IHS plans to obtain the data and to meet the statutory requirement for consultation with the Self-Governance Tribes → (SGT) through one or more grants. The SGT have established a planning group which, we understand, will recommend to the SGT → that a grant go to a single tribe which, in turn, will organize the consultation. Though the main purpose will be to provide data and input for the IHS study and recommendations, it is possible that each of the SGT will also end up with a plan on how it would proceed to implement any future self-governance statute. Funds for indirect costs, in addition to the \$500,000 earmarked for the project, may have to be identified. The attached memorandum provides additional background information.

Please respond to the issues raised in the earlier requests for opinion in light of the above discussion of IHS intent. The IHS is to report on progress 2 weeks before the appropriation hearings. Therefore, your prompt response to the request is needed in order that we may proceed both expeditiously and within our legal authorities.

  
Everett R. Rhoades, M.D.  
Assistant Surgeon General

Attachment

Page 2 - Senior Attorney

cc:

Mr. Lincoln

Mr. Marsland

Ms. Reyes

Mr. Black

Mr. Roach

Mr. Morris

Mr. Price

Mr. Mahsetky

Ms. Schoening

# DEPARTMENT OF HEALTH AND HUMAN SERVICES

TO: Senior Attorney  
Public Health Division FEB 11 1992

FROM: Director

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*Robert McSwain*

Everett R. Rhoades, M.D.  
Assistant Surgeon General

Attachment

FILE  
COPY

OFFICE	SURNAME	DATE	OFFICE	SURNAME	DATE	OFFICE	SURNAME	DATE
D.L.R.	M. Chelby	2/3/92	ES	Leblanc	2/10/92			
WAZ	Boyle	2/4/92	OO	M. L. L. L.	2/10/92			
OTA	Boyle	2/5/92						



cc:

Mr. Lincoln  
Mr. Marsland  
Ms. Reyes  
Mr. Black  
Mr. Roach  
Mr. Morris  
Mr. Price  
Mr. Mahsetky  
Ms. Schoening

Prepared by:IHS/OPEL/DLR/RJMcCloskey/sf/01/27/92/443-1116  
Final:McCloskey/sf/02/03/92/443-1116  
Doc. #O:\WP\DLR\RJM.Self.Gov.Auth.  
FILE:RFO 91-120

Indian Health Service  
Rockville MD 20857

DEC 23 1991

TO: Duke McCloud, Senior Attorney  
Office of the General Counsel

FROM: Director  
Division of Legislation & Regulations

SUBJECT: RFO 91-120: Self-Governance Authority

On November 4, 1991, our office forwarded a Request for Opinion regarding a provision in the conference report to the FY 92 appropriation for the IHS. This provision purports to make \$500,000 available to the IHS to reimburse tribes for planning activities under Title III of P.L. 93-638 as amended, Self-Governance Demonstration Project. At the time of the request, IHS questioned whether Title III provided authority to the IHS to spend the \$500,000 earmark.

Subsequent to our request, Congress amended Title III, at P.L. 102-185 (105 Stat. 1278), a copy is attached. Of interest to IHS is Section 308 which directs the IHS to conduct a study of the feasibility of including health in Self-Governance projects, in consultation with the Secretary of the Interior and participating Indian tribal governments.

Please advise whether this new language would authorize IHS to get the funds mentioned in the FY 92 appropriation report to the tribes or allow the IHS to conduct the feasibility study authorized in Section 308.

*for* *Les Morris*  
Richard J. McCloskey

Attachment

cc: Lincoln  
Marsland  
Reyes  
Buzzard  
Mahsetky  
Schoening

HR3394

Miller G. (D-CA)

11/19/91

(114 lines)

Enrolled (finally passed both houses)

No title published in this version

Situation Key: (See User Manual for complete list)

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H.R.3394

Agreed to November 19, 1991

One Hundred Second Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Thursday, the third day of  
January,

one thousand nine hundred and ninety-one

An Act

//Be it enacted by the Senate and House of Representatives of the  
United States of America in Congress assembled,\\

## SECTION 1. SHORT TITLE.

This Act may be cited as the "Tribal Self-Governance  
Demonstration Project Act".SEC. 2. EXTENSION OF TIME FOR TRIBAL SELF-GOVERNANCE DEMONSTRATION  
PROJECT.Section 301 of the Indian Self-Determination and Education  
Assistance Act (25 U.S.C. 450f note) (hereafter in this Act referred  
to as the "Act") is amended by striking out "five" and inserting in  
lieu thereof "eight".

## SEC. 3. INCREASE IN NUMBER OF TRIBES PARTICIPATING IN PROJECT.

Section 302(a) of the Act is amended by striking out "twenty" and  
inserting in lieu thereof "thirty".SEC. 4. COMPLETION OF GRANTS AS A PRECONDITION TO NEGOTIATION OF  
WRITTEN ANNUAL FUNDING AGREEMENTS.Section 303(a) of the Act is amended by striking out "which--"  
and inserting in lieu thereof "that successfully completes its  
Self-Governance Planning Grant. Such annual written funding  
agreement--".

## SEC. 5. ADDITIONAL FUNDING FOR SELF-GOVERNANCE PLANNING GRANTS.

Title III of the Act is amended by adding at the end thereof the  
following new section:"Sec. 307. For the purpose of providing planning and negotiation  
grants to the ten tribes added by section 3 of the Tribal  
Self-Governance Demonstration Project Act to the number of tribes set  
forth by section 302 of this Act (as in effect before the date of  
enactment of this section), there is authorized to be appropriated  
\$700,000.".

SEC. 3. EXTENSION OF PROJECT; FEASIBILITY STUDIES.  
(a) Project Not Limited to Certain Programs.--Section 303(a)(1) of the Act is amended by striking "authorized under" and inserting in lieu thereof the following: "of the Department of the Interior that are otherwise available to Indian tribes or Indians, including but not limited to,".

(b) Authorized Agreements.--Section 303(d) of the Act is amended by inserting immediately before the period at the end thereof a semicolon and the following: "except that for the term of the authorized agreements under this title, the provisions of section 2103 of the Revised Statutes of the United States (25 U.S.C. 81), and section 16 of the Act of June 18, 1934 (25 U.S.C. 476), shall not apply to attorney and other professional contracts by participating Indian tribal governments operating under the provisions of this title".

(c) Interpretation.--Section 303 of the Act is amended by adding at the end thereof the following:

"(f) To the extent feasible, the Secretary shall interpret Federal laws and regulations in a manner that will facilitate the inclusion of activities, programs, services, and functions in the agreements authorized by this title."

(d) Studies.--Title III of the Act is amended by adding after section 307 (as added by section 5 of this Act) the following new sections:

"Sec. 308. (a) The Secretary of Health and Human Services, in consultation with the Secretary of the Interior and Indian tribal governments participating in the demonstration project under this title, shall conduct a study for the purpose of determining the feasibility of extending the demonstration project under this title to the activities, programs, functions, and services of the Indian Health Service. The Secretary shall report the results of such study, together with his recommendations, to the Congress within the 12-month period following the date of the enactment of the Tribal Self-Governance Demonstration Project Act.

"(b) The Secretary of Health and Human Services may establish within the Indian Health Service an office of self-governance to be responsible for coordinating the activities necessary to carry out the study required under subsection (a).

"Sec. 309. The Secretary of the Interior shall conduct a study for the purpose of determining the feasibility of including in the demonstration project under this title those programs and activities excluded under section 303(a)(3). The Secretary of the Interior shall report the results of such study, together with his recommendations, to the Congress within the 12-month period following the date of the enactment of the Tribal Self-Governance Demonstration Project Act."

Speaker of the House of Representatives.  
Vice President of the United States and  
President of the Senate.

There are no more items to read.

Results: 5 items in BILLTEXT  
Search criteria used:  
BILL:HR3394  
Results are: